

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,) CR 08-0916-TUC-CKJ (GEE)
Plaintiff,)
vs.)
BRITTANY ANNE SEIBEL,)
Defendant.)

)

The District Court referred this case to the Magistrate for hearing on pretrial matters. Hearing on the defendant's Motion to Suppress [Doc 32] was held on June 9, 2009. Upon consideration of the evidence presented and the arguments of respective counsel, the Magistrate recommends the District Court, after its de novo review, deny the Motion to Suppress.

CHARGE:

The one count indictment charges that on June 21, 2008, the defendant possessed marijuana in violation of 21 U.S.C. §§841(a)(1) and (b)(1)(B)(vii).

The defendant argues the stop of the vehicle she was driving on June 21, 2008 was unreasonable and, therefore all evidence seized as a result of that stop should be suppressed.

1 **EVIDENCE:**

2 ***Testimony of Kenneth Johnson, BPA***

3 Johnson testified he is familiar with State Route (SR) 85 which runs north from the
4 Lukeville POE to Why, AZ. It is only one lane in each direction. The distance from
5 Lukeville and Why is approximately 28 miles, and all but 4 or 5 miles of that part of the road
6 runs through the Organ Pipe National Monument Park which is mostly open desert.
7 Lukeville is “a really small town” occupied only by 15 U.S. Customs Officers. There are no
8 towns or cities between Lukeville and Why, and all of the exits on SR 85 in that area are
9 scenic routes through the national park. The population of Why does not exceed 50 people.
10 The area on SR 85 just north of the Lukeville is “very commonly used for smuggling.” The
11 Lukeville POE is designated milepost 80 and the mile marker numbers decrease as one
12 travels north on SR 85.

13 On the evening of June 21, 2008, he was patrolling on SR 85 about 7-8 miles north of the
14 border. It was dark; there are no street lights in that area. It was a Saturday evening-around
15 8:30 or 9:30-- and traffic was “fairly light.” He was in a marked service vehicle and had
16 stopped to check on a vehicle stopped alongside the road. The occupants were an older
17 couple who stated they were taking a break from driving; they acquiesced to his request to
18 look into their vehicle’s trunk. As he was doing this he noticed three northbound vehicles
19 pass him traveling in tandem very closely--within 10 feet of each other’s bumpers. He said
20 such driving is not typical in that area because it is a “wide open road, there’s no reason for
21 them to be all clumped up.” The defendant was driving a red SUV Nissan Armada between
22 two older pick up trucks. Johnson stated he was suspicious of the vehicles and decided to
23 follow them to get a better look at the Armada which he believed was being “protected” by
24 the two pickups. It took him about five to ten minutes to get back into his service vehicle
25 and catch up to the three vehicles. He got into the southbound traffic lane, turned on his
26 signal to indicate his desire to get between the Armada and the last pickup; however, the
27 driver of the last pickup initially would not yield to allow him to get behind the Armada.
28 Johnson testified this further aroused his suspicions because in his experience drivers will

1 usually “make way” for law enforcement vehicles. Johnson maintained his position –there
2 was no southbound traffic—and continued efforts to get behind the Armada. Eventually, the
3 last pickup “backed off” and Johnson was able to get behind the Armada.

4 Once he was behind the Armada Johnson noticed the tags were a fleet tag, suggesting it
5 was a rental. He ran the license plate and, indeed, it was registered to a rental agency. At
6 this time he was seven to ten feet from the Armada’s rear bumper and noticed “silhouettes,
7 square-shaped objects that would be immediately arousing my suspicion that it possibly
8 could be marijuana bundles inside [the Armada].” Johnson testified that his service vehicle
9 was modified so that it “definitely s[at] higher than an Armada.”

10 The fact the Armada was a rental was significant to Johnson because rental vehicles are
11 commonly used by smuggling organizations. He further stated the Armada had a large back
12 window which was “slightly tinted.” He also testified that while he was following the
13 Armada and before he activated his overhead lights it appeared the driver was nervous
14 because she veered over to the shoulder. Once he and the Armada had stopped, Johnson
15 exited his vehicle and he smelled the odor of marijuana as he walked forward toward the
16 Armada.. As he approached he shined his flashlight into the Armada and saw bundles. The
17 defendant would not turn off her engine, roll down her window, or open the door. He pulled
18 his service weapon and ordered the defendant to shut the engine off and exit the vehicle.

19 Nine bundles of marijuana, weighing about 455 lbs., were found in the rear of the
20 Armada. Exhibits 2 through 10 were introduced into evidence; these are copies of photos
21 Johnson took of the Armada and marijuana bundles about 30 to 40 minutes after the stop
22 when the Armada had been towed or driven to the Ajo Border Patrol Station. With regard
23 to those photos (Exhibits 8 and 10) of the marijuana inside the Armada, Johnson testified the
24 contraband had not been moved before the photos were taken.

25 Upon consulting his report, Johnson testified he stopped the Armada at 9 p.m. at milepost
26 69 on SR 85. After he had secured the Armada and the defendant, Johnson radioed to other
27 agents to try to locate the two pickups which had been traveling in tandem with the Armada
28 but those vehicles were never located.

1 On cross-examination Johnson stated he had been on patrol duty on his own for only two
2 months before the evening of June 21st. He was stopped at milepost 73 when he first
3 observed the three vehicles traveling north in tandem at about 65 mph. Johnson testified the
4 highway is “pretty straight”; however, there are some hills and curves where there are no
5 passing lanes. He admitted he had not recorded the license number of the rear pickup truck,
6 nor had he noted the color, make or model of either of the pickups. Johnson stated his
7 headlights were “hitting the whole back of the [Armada]”, but he didn’t “know exactly
8 where they were aimed.” Exhibit 11 shows the marijuana bundles outside the Armada and
9 Johnson stated most were painted black. He admitted that the photos of the Armada taken
10 at the Border Patrol Station do not depict the conditions under which he observed it on SR
11 85. There was no southbound traffic on SR 85 that would have illuminated the inside of the
12 Armada. Johnson admitted he was not certain that the square shaped objects he saw through
13 the rear window of the Armada were marijuana bundles and not suitcases or some other
14 square shaped objects.

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16 ***Testimony of Robert Beauzil, BPA***

17 He was on duty on June 21, 2008, and had contact with BPA Johnson at about 9 p.m.
18 Beauzil was northbound on SR 85 when he pulled off the road to speak with Johnson as a
19 vehicle he (Johnson) had just stopped was pulling away. While he and Johnson were
20 speaking three northbound vehicles passed traveling close together—about a car length and
21 a half to two car lengths apart. Beauzil stated there was no reason for the vehicles to be
22 traveling so close because there was no other northbound traffic in the area. The first vehicle
23 was a Ford or Chevy pickup, the second was a Nissan SUV of some type, and he could not
24 recall the make or model of the third vehicle. Johnson stated to Beauzil that the vehicles
25 seemed to be traveling together and indicated he was going to check them out. Johnson got
26 into his service vehicle and drove after the vehicles. Beauzil was in his own service vehicle
27 and followed Johnson “to back up a little bit.” He confirmed that SR 85 is a known
28 smugglers route. He stated he was about a half mile behind Johnson and did not see his

1 efforts to get behind the Armada. By the time he came upon Johnson, the Armada was
2 already pulled over. Beauzil stopped his vehicle, got out and saw Johnson had his gun
3 drawn. Beauzil drew his gun as he approached the Armada on the passenger side and asked
4 the female driver to put her hands up and exit the vehicle. Beauzil stated the window was
5 down and the engine still running. Beauzil stated he saw what appeared to be marijuana
6 bundles in the back of the defendant's vehicle and the bundles were visible above the
7 window line.

8 During cross-examination Beauzil stated he had not written a report regarding his
9 involvement in the stop of the Armada, but had reviewed Johnson's report "back when it the
10 report was made." He confirmed the Armada's rear windows were tinted. He saw no
11 bundles when he initially observed the Armada passing his location.

12 Beauzil stated he did not smell marijuana until he was at the passenger side of the Armada
13 and the passenger window was open at that time.

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15 **DISCUSSION:**

16 The search and seizure of a motorist suspected of criminal activity is analyzed according
17 to the framework set out in *Terry v. Ohio*, 392 U.S. 1 (1968). For a lawful investigative stop
18 the officer must have a "reasonable suspicion supported by articulable facts that criminal
19 activity "may be afoot." *United States v. Sokolow*, 490 U.S. 1,7 (1989). In determining
20 whether reasonable suspicion existed to justify an investigatory stop, a reviewing court is
21 required to "look at the totality of the circumstances of each case to see whether the detaining
22 officer ha[d] a particularized and objective basis for suspecting legal wrongdoing." *United*
23 *States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal punctuation omitted). "In the context of
24 Border Patrol [stops], the factors to be considered in determining whether 'reasonable
25 suspicion' exists to justify stopping a vehicle include, but are not limited to: (1) characteristics
26 of the area; (2) proximity to the border; (3) usual patterns of traffic and time
27 of day; (4) previous alien or drug smuggling in the area; (5) behavior of the driver...; (6)
28 appearance or behavior of passengers; (7) model and appearance of the vehicle; and (8)

1 officer experience.” *United States v. Garcia-Barron*, 116 F.3d 1305; 1307 (9th Cir. 1997)
2 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975).

3 Defense counsel argues that Johnson admitted that when he decided to stop the Armada
4 he was “just speculating that the objects he saw in [back of the Armada] were marijuana or
5 contraband....There are no specific articulable facts of any wrongdoing.”

6 This court does not agree with this statement. First, it should be noted the case law does
7 not require that a stopping officer must know with certainty that criminal activity is afoot
8 before undertaking an investigatory stop. Of course, a mere hunch or guess will not justify
9 an investigatory stop. Articulable facts are necessary to justify the stop and, contrary to the
10 defendant’s assertion, Johnson set forth several articulable facts that led to his decision to
11 conduct an investigatory stop of the Armada. First was his observation that the three vehicles
12 seemed to be traveling closely in tandem when there was little other traffic; this testimony
13 was corroborated by Beauzil who was present with Johnson when the three vehicles passed
14 their location. Johnson testified his past experience was that vehicles traveled in such a
15 manner in an attempt to “protect” the load vehicle. This suspicion was bolstered when the
16 third vehicle initially thwarted Johnson’s attempts to get his marked service vehicle between
17 it and the Armada. Johnson’s suspicions were not allayed when the registration check
18 revealed the Armada was a rental; he testified his experience is that smugglers use rental
19 vehicles to avoid personal losses. Both Johnson and Beauzil testified that the area of SR 85
20 where the Armada was first seen is known to be used by smugglers.

21 Considering the factors listed by Johnson and analyzing them in the context of the “totality
22 of the circumstances”, this court concludes he had reasonable suspicion to conduct an
23 investigative stop of the defendant’s vehicle.

24 During his statements at the end of the hearing defense counsel argued that because
25 officers had drawn their guns, pointed them at the defendant, and ordered her from the
26 vehicle, the investigatory stop was elevated to a felony arrest and probable cause was
27 required to justify the stop, not just reasonable suspicion. Because this issue had not been
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1 briefed by the parties, the court directed defense to file a memorandum and the government
2 to file a response.

3 Johnson testified that he stopped his vehicle behind the Armada and walked to the driver's
4 side. When the driver would not comply with his request that she shut off the engine, roll
5 down the window, and exit the Armada Johnson pulled his gun. Beauzil confirmed he
6 stopped to assist Johnson and approached the Armada from the passenger side. He saw
7 Johnson had his gun pulled and the Armada's engine was still running and the driver was still
8 inside. Beauzil testified the Armada's window was rolled down, but he did not state which
9 one. Beauzil stated he also pulled his gun and the driver acceded to his order to exit the
10 Armada. .

11 The defendant does not concede the investigatory stop was valid, but argues that when
12 Johnson pulled his weapon the investigatory stop was converted into an arrest which
13 required probable cause. The defense correctly notes there are "a myriad of cases" wherein
14 the courts have dealt with the issue of whether an officer's drawing his gun automatically
15 transforms a permissible investigatory stop into an arrest. In considering this question in
16 *Washington v. Lambert*, 98 F.3d 1181 (9th Cir.1996), the court noted, "There is no bright-line
17 rule to determine when an investigatory stop becomes an arrest. Rather...courts consider the
18 'totality of the circumstances.'....As a result, we have held that while certain police actions
19 constitute an arrest in certain circumstances, e.g., where the 'suspects' are cooperative, those
20 *same* actions may *not* constitute an arrest where the suspect is uncooperative or the police
21 have specific reasons to believe that a serious threat to the safety of the officers exists." *Id.*
22 at 1185 (citations omitted).

23 It should be noted there was no evidence that Johnson pulled his gun as soon as he exited
24 his vehicle, and there is nothing to contradict his testimony that he did not pull his gun until
25 *after* the defendant refused to comply with his request to turn off the engine, roll down the
26 window, and exit the Armada. This court concludes that the defendant's refusal to
27 cooperate—especially with the request to turn off the engine—could have reasonably led
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1 Johnson to fear either for his own safety or that the defendant would attempt to flee the
2 scene. Therefore, his actions did not convert the investigatory stop into an arrest.

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4 **RECOMMENDATION:**

5 In view of the foregoing, the magistrate recommends that the District Court, after its
6 independent review of the record, **DENY** the defendant's Motion to Suppress. Any party
7 may file objections within 10 days of being served with a copy of this Report and
8 Recommendation. If objections are not timely filed, the party's right to de novo review may
9 be waived. If objections are filed, the parties should direct them **directly** to the District
10 Court **by omitting the magistrate's initials from the caption.**

11 This Report and Recommendation is being faxed to all counsel on today's date. The Clerk
12 of the Court is directed to send a copy of this Report and Recommendation to all parties.

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14 DATED this 30th day of July, 2009.

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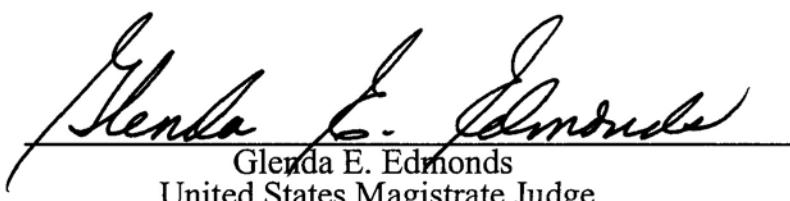
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23 Glenda E. Edmonds
24 United States Magistrate Judge

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